

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 11, 2019

SEAN F. McAVOY, CLERK

JESSICA J.,

No. 4:18-CV-05048-JTR

Plaintiff,

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 17, 21. Attorney D. James Tree represents Jessica J. (Plaintiff); Special Assistant United States Attorney Benjamin J. Groebner represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's motion for summary judgment and **DENIES** Defendant's motion for summary judgment.

JURISDICTION

Plaintiff filed an application for Supplemental Security Income (SSI) on

1 June 22, 2011, Tr. 75, 223, alleging disability since June 1, 2007, Tr. 216, due to
2 depression, anxiety, post-traumatic stress disorder (PTSD), fibromyalgia, lupus,
3 herniated disk in her neck, and a sphincter of Oddi dysfunction, Tr. 283. The
4 application was denied initially and upon reconsideration. Tr. 106-13, 117-23.
5 Administrative Law Judge (ALJ) Virginia M. Robinson held a hearing on January
6 15, 2013 and heard testimony from Plaintiff and vocational expert Trevor Duncan.
7 Tr. 34-71. At the hearing, Plaintiff requested that the ALJ consider a closed period
8 of disability from July 2008 through or up to August 2012 because Plaintiff had
9 been hired as a cook at a treatment center in August of 2012 and was working. Tr.
10 38-39. The ALJ issued an unfavorable decision on March 22, 2013 finding
11 Plaintiff had not been under a disability, as defined in the Social Security Act,
12 since the application was filed on June 22, 2011. Tr. 14-28. The Appeals Council
13 denied review on April 28, 2014. Tr. 1-3. The ALJ's March 22, 2013 decision
14 became the final decision of the Commissioner, which was appealed to this Court
15 on June 30, 2014. Tr. 948-50. On April 8, 2015, this Court remanded the case for
16 additional proceedings. Tr. 960-84.

17 While the 2011 application was pending before this Court, Plaintiff filed a
18 subsequent application for SSI benefits on August 4, 2014, Tr. 990, alleging
19 disability beginning on June 6, 2013, Tr. 1153. This subsequent application was
20 denied initially and at reconsideration. Tr. 1048-51, 1053-62.

21 On August 11, 2015, the Appeals Council remanded the 2011 application to
22 the ALJ for additional proceedings and consolidated the 2011 application and the
23 subsequent application into a single record. Tr. 988. The ALJ held a hearing on
24 the consolidated claims on January 20, 2017 and heard testimony from Plaintiff
25 and vocational expert Kimberly Mullinax. Tr. 876-918. On January 11, 2018, the
26 ALJ issued an unfavorable decision. Tr. 796-812. The Appeals Council did not
27 assume jurisdiction within the prescribed period so the ALJ's January 11, 2018
28 decision became the final decision of the Commissioner and is appealable to the

1 district court pursuant to 42 U.S.C. §§ 405(g), 1383(c). 20 C.F.R. § 416.1484(c).

2 Plaintiff initiated this action on March 26, 2018. ECF Nos. 1, 4.

3 **STATEMENT OF FACTS**

4 The facts of the case are set forth in the administrative hearing transcript, the
5 ALJ's decision, and the briefs of the parties. They are only briefly summarized
6 here.

7 Plaintiff was 41 years old at the date of filing. Tr. 215. She reported that the
8 last grade she completed was the eighth and that she had attended special education
9 classes. Tr. 284. Her reported work history includes the jobs of commercial truck
10 driver and deli and seafood clerk. *Id.* When applying for benefits Plaintiff
11 reported that she stopped working on July 16, 2008 because she was fired, but that
12 her condition was severe enough to keep her from working as of June 1, 2007. Tr.
13 283.

14 **STANDARD OF REVIEW**

15 The ALJ is responsible for determining credibility, resolving conflicts in
16 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
17 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
18 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
19 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
20 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
21 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
22 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
23 another way, substantial evidence is such relevant evidence as a reasonable mind
24 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
25 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
26 interpretation, the court may not substitute its judgment for that of the ALJ.
27 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
28 findings, or if conflicting evidence supports a finding of either disability or non-

1 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
2 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
3 evidence will be set aside if the proper legal standards were not applied in
4 weighing the evidence and making the decision. *Brawner v. Secretary of Health*
5 and *Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

6 **SEQUENTIAL EVALUATION PROCESS**

7 The Commissioner has established a five-step sequential evaluation process
8 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen*
9 *v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of
10 proof rests upon the claimant to establish a *prima facie* case of entitlement to
11 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the
12 claimant establishes that physical or mental impairments prevent her from
13 engaging in her previous occupations. 20 C.F.R. § 416.920(a)(4). If the claimant
14 cannot do her past relevant work, the ALJ proceeds to step five, and the burden
15 shifts to the Commissioner to show that (1) the claimant can make an adjustment to
16 other work, and (2) specific jobs which the claimant can perform exist in the
17 national economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94
18 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the
19 national economy, a finding of "disabled" is made. 20 C.F.R. § 416.920(a)(4)(v).

20 **ADMINISTRATIVE DECISION**

21 On January 11, 2018, the ALJ issued a decision finding Plaintiff was not
22 disabled as defined in the Social Security Act from June 22, 2011 through the date
23 of the decision.

24 At step one, the ALJ found Plaintiff had engaged in substantial gainful
25 activity (SGA) from August 3, 2012 to June 19, 2013. Tr. 799. However, since
26 there was a continuous 12-month period during which Plaintiff did not engage in
27 SGA, the ALJ continued the sequential evaluation process. *Id.*

28 At step two, the ALJ determined that Plaintiff had the following severe

1 impairments: degenerative disc disease; degenerative joint disease of the left knee;
2 fibromyalgia; asthma; disorder of the muscle, ligament, and fascia; affective
3 disorders; anxiety disorders; personality disorders; and eating disorders. Tr. 733.

4 At step three, the ALJ found that Plaintiff did not have an impairment or
5 combination of impairments that met or medically equaled the severity of one of
6 the listed impairments. Tr. 800.

7 At step four, the ALJ assessed Plaintiff's residual function capacity and
8 determined she could perform a range of light work with the following limitations:

9 lift and or carry up to 20 pounds occasionally and up to 10 pounds
10 frequently; she can stand and or walk for approximately 6 hours and sit
11 for approximately 6 hours per 8-hour workday with normal breaks; she
12 can frequently climb ramps and stairs; she can occasionally climb
13 ladders, ropes, and scaffolds; she can frequently stoop, kneel, crouch,
14 or crawl; she is limited to frequent fingering; she must avoid
15 concentrated exposure to excessive vibration, exposure to pulmonary
16 irritants such as fumes and gases and work place hazards such as
17 unprotected heights; she is limited to simple routine tasks, in a routine
18 work environment with simple work related decisions; she is limited to
superficial interaction with coworkers and incidental interaction with
the public, no interaction with the public as part of required duties.

19 Tr. 801-02. The ALJ identified Plaintiff's past relevant work as tractor-trailer
20 truck driver, cafeteria cook, and kitchen helper and concluded that Plaintiff was not
21 able to perform this past relevant work. Tr. 810-11.

22 At step five, the ALJ determined that, considering Plaintiff's age, education,
23 work experience and residual functional capacity, and based on the testimony of
24 the vocational expert, there were other jobs that exist in significant numbers in the
25 national economy Plaintiff could perform, including the jobs of production
26 assembler, housekeeping cleaner, and packing line worker. Tr. 811-12. The ALJ
27 concluded Plaintiff was not under a disability within the meaning of the Social
28 Security Act at any time from June 22, 2011 through the date of the decision. Tr.

1 812.

2 **ISSUES**

3 The question presented is whether substantial evidence supports the ALJ's
4 decision denying benefits and, if so, whether that decision is based on proper legal
5 standards. Plaintiff contends the ALJ erred by (1) finding Plaintiff had engaged in
6 SGA at step one, (2) failing to address Plaintiff's right knee impairment at step
7 two, (3) failing to properly weigh the medical opinions, (4) failing to properly
8 consider lay witness testimony, and (5) failing to properly address Plaintiff's
9 symptom statements.

10 **DISCUSSION¹**

11 **1. Step One**

12 Plaintiff argues that the work she performed from August of 2012 to June of
13 2013 should not qualify as SGA because she was receiving accommodations that
14 equated to a sheltered or special work environment. ECF No. 17 at 5-7. In the
15 alternative, Plaintiff argues that nine months of the work qualifies as a trial work
16 period and the period she worked beyond nine months was still within her
17 extended period of eligibility. ECF No. 17 at 8.

18 At step one, the ALJ determines if a claimant is working and whether that
19 work amounts to SGA. 20 C.F.R. § 416.920(a)(4)(i). If a claimant is working and
20 that work is deemed to be SGA, that individual is found not disabled. 20 C.F.R. §

21

22 ¹In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
23 that ALJs of the Securities and Exchange Commission are “Officers of the United
24 States” and thus subject to the Appointments Clause. To the extent Lucia applies
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
26 their briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant’s opening brief).

1 416.920(b). If a claimant is working as an employee, her earnings show whether
2 she has performed SGA. 20 C.F.R. § 416.974(a)(1). A claimant's average
3 monthly earnings exceeding the SGA benchmark show that the claimant is
4 performing SGA. 20 C.F.R. § 416.974(b). In 2012, an average monthly earnings
5 above \$1,010.00 demonstrated SGA. POMS DI 10501.015. Likewise, in 2013, an
6 average monthly earnings above \$1,040.00 demonstrated SGA. *Id.*

7 From August of 2012 to June of 2013, Plaintiff was employed at Yakima
8 Valley Council on Alcoholism, and her earnings averaged \$1,120.46 a month in
9 2012 (\$5,602.32 divided by 5 months) and \$1,746.78 a month in 2013 (\$10,480.68
10 divided by six months). Tr. 1149.

11 However, earnings exceeding the SGA bench mark does not necessarily
12 equate to performing SGA. The ALJ and Plaintiff have addressed three ways in
13 which a person's work above the SGA benchmark may not be evidence of SGA:
14 (1) an unsuccessful work attempt; (2) sheltered or special environment; and (3) a
15 trial work period followed by extended period of eligibility. Tr. 799; ECF No. 17
16 at 5-8.

17 First, the ALJ considered whether Plaintiff's work could be considered an
18 unsuccessful work attempt in her decision; she found that Plaintiff's work did not
19 qualify as an unsuccessful work attempt. Tr. 799. An unsuccessful work attempt
20 is work lasting up to six months that the claimant had to stop or reduce to below
21 SGA levels because of an impairment. 20 C.F.R. § 416.974(c)(1). Earnings from
22 an unsuccessful work attempt are not considered when determining whether or not
23 work is SGA at step one. 20 C.F.R. § 416.974(a)(1). Here, Plaintiff's employment
24 at SGA levels exceeded six months. Tr. 1149, 1259. Therefore, the work does not
25 qualify as an unsuccessful work attempt, 20 C.F.R. § 416.974(c)(4), and the ALJ
26 did not err in her determination.

27 Second, Plaintiff argues that she received accommodations at this job that
28 resulted in the work qualifying as a sheltered or special environment. ECF No. 17

1 at 5-7. The calculation of SGA only considers the earnings an employee claimant
2 actually earns. 20 C.F.R. § 416.974(a)(1). If a claimant is working in a sheltered
3 workshop “you may or may not be earning the amounts you are being paid. The
4 fact that sheltered workshop or similar facility is operating at a loss or is receiving
5 some charitable contributions or governmental aid does not establish that you are
6 earning all you are being paid.” 20 C.F.R. § 416.974(a)(3). “Sheltered
7 employment is employment provided for individuals with disabilities in a protected
8 environment under an institutional program.” POMS DI 10505.025D. “An
9 employee working in a sheltered workshop or comparable facility for severely
10 impaired persons will ordinarily be considered not engaged in SGA if the
11 employee’s ‘countable earnings’ do not average more than the amount shown in
12 the Earnings Guidelines (DI 10501.015).” *Id.* If a claimant is working under
13 special conditions that take into account her impairments, the work may not
14 demonstrate SGA. 20 C.F.R. § 416.973(c). Examples of special conditions
15 include assistance from other employees in performing the work, allowed to work
16 irregular hours or take frequent rest periods, provided special equipment, assigned
17 work especially suited to the impairment, arranged special circumstances,
18 permitted to work at a lower standard of productivity or efficiency, or given work
19 because of a family relationship or past association with the employer. *Id.*

20 Plaintiff argues that because she was allowed to take a lot of time off and
21 have another employee cover for her, her work falls under the special conditions
22 addressed in 20 C.F.R. § 416.973(c). ECF No. 17 at 6-7. There is no evidence that
23 the treatment facility received subsidies for employing Plaintiff or that it was an
24 institutional program. Therefore, the work does not qualify as sheltered work.
25 While Plaintiff presents evidence of being allowed to take additional time off, there
26 is no evidence that these potential special conditions demonstrate that Plaintiff did
27 not earn her wages. In Plaintiff’s performance review, it was noted that she was
28 missing work, but that she had a legitimate reason and provided proper notice. Tr.

1 1187. It also noted that she met or exceeded expectations in all of the areas of
2 review. *Id.* There is no evidence that allowances were made to the extent that
3 Plaintiff did not earn her wages.

4 Third, Plaintiff argues that the work should be considered a trial work period
5 followed by an extended period of eligibility. A trial work period allows a
6 claimant to test her ability to work while still being considered disabled. 20 C.F.R.
7 § 404.1592(a). A claimant can test her ability to perform work for up to nine
8 months. *Id.* Earnings exceeding \$720.00 a month in 2012 and \$750.00 a month in
9 2013 count towards the nine months of the allowed trial work period. 20 C.F.R. §
10 404.1592(b); Monthly Earnings That Trigger a Trial Work Period,
11 <https://www.ssa.gov/oact/cola/twp.html> (last viewed Oct. 11, 2018). Following a
12 trial work period, a claimant enters the reentitlement period, also known as the
13 extended period of eligibility. 20 C.F.R. § 404.1592a; POMS DI 13010.210. This
14 is a 36 month period in which a claimant may continue to test her ability to work,
15 but if a claimant stops earning SGA, benefits are reinstated without the need to file
16 a new application. 20 C.F.R. § 404.1592a(a). Plaintiff's argument cannot succeed
17 because the trial work period and the extended period of eligibility only apply to
18 applications for Social Security Disability Insurance benefits under Title II and
19 Plaintiff has filed an application for SSI benefits under Title XVI. *See* 20 C.F.R. §
20 404.1 (“The regulations in this part 404 . . . relate to the provisions of title II of the
21 Social Security Act . . .”).

22 In conclusion, the ALJ did not err in her determination that Plaintiff had
23 engaged in SGA from August 2012 to June 2013 based on the evidence in the
24 record and the arguments made by the parties.²

25
26 ²The Court acknowledges that there are post eligibility earnings rules in SSI
27 cases that may or may not be applicable to the period in question based an initial
28 finding of eligibility at either the alleged onset date or application date. *See* POMS

1 **2. Step Two**

2 Plaintiff challenges the ALJ's step two determination asserting that the ALJ
3 erred by failing to address her right knee impairment. ECF No. 17 at 8-9.

4 Step-two of the sequential evaluation process requires the ALJ to determine
5 whether or not the claimant "has a medically severe impairment or combination of
6 impairments." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citation
7 omitted). "An impairment or combination of impairments can be found 'not
8 severe' only if the evidence establishes a slight abnormality that has 'no more than
9 a minimal effect on an individual[']s ability to work.'" *Id.* at 1290. The step-two
10 analysis is "a *de minimis* screening device to dispose of groundless claims." *Id.*

11 In her step two determination, the ALJ addressed Plaintiff's left knee finding
12 that her degenerative joint disease of the left knee was a severe impairment. Tr.
13 799. Additionally, the ALJ discussed Plaintiff's obesity, endometriosis,
14 gastroesophageal reflux disease, lupus, carpal tunnel syndrome, and sleep disorder,
15 but found these were not severe impairments. Tr. 800. Nowhere in the decision
16 did the ALJ discuss Plaintiff's right knee impairment.

17 As early as 2009, Plaintiff complained of her knees bothering her. Tr. 545.
18 During an evaluation in August of 2014, the provider observed bilateral knee
19 swelling. Tr. 1393. A March 12, 2015 x-ray showed bilateral mild to early
20 moderate narrowing of the medial femorotibial compartments with mild bone
21 sclerosis and small marginal spurs, small marginal spurs along proximal lateral
22 tibias, and mild lateral patellofemoral joint space narrowing with small adjacent
23 spurs. Tr. 1672. The impression following the imaging was bilateral osteoarthritic
24 changes. *Id.* This is objective evidence of an impairment in both knees.
25 Additionally, on April 21, 2015 and October 7, 2015 examinations of the right

26
27 SI 02301.215. However, none of these arguments were presented to the Court, so
28 they will not be addressed in this determination.

1 knee demonstrated mild crepitus, mild compression pain, a good range of motion,
2 and decreased strength in the quadriceps and hip abduction. Tr. 1646, 1649. She
3 received a Depo-Medrol injection in the right knee joint. Tr. 1646.

4 There is some objective evidence that Plaintiff's knee impairment is present
5 bilaterally. Since the case is being remanded to address the opinion evidence, *see*
6 *infra.*, the ALJ will address both Plaintiff's left knee and right knee impairments at
7 step two.

8 **3. Medical Opinions**

9 Plaintiff argues that the ALJ failed to properly consider and weigh the
10 opinions expressed by Jan M. Kouzes, Ed.D., N.K. Marks, Ph.D., Mark Duris,
11 Ph.D., Pamela Miller, Ph.D., Leslie Postovoit, Ph.D., Eugene Kester, Ph.D.,
12 Matthew Comrie, Psy.D., and Ben Pate, PA-C. ECF No. 17 at 9-19.

13 In weighing medical source opinions, the ALJ should distinguish between
14 three different types of physicians: (1) treating physicians, who actually treat the
15 claimant; (2) examining physicians, who examine but do not treat the claimant;
16 and, (3) nonexamining physicians who neither treat nor examine the claimant.

17 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
18 weight to the opinion of a treating physician than to the opinion of an examining
19 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
20 should give more weight to the opinion of an examining physician than to the
21 opinion of a nonexamining physician. *Id.*

22 When an examining physician's opinion is not contradicted by another
23 physician, the ALJ may reject the opinion only for "clear and convincing" reasons,
24 and when an examining physician's opinion is contradicted by another physician,
25 the ALJ is only required to provide "specific and legitimate reasons" to reject the
26 opinion. *Lester*, 81 F.3d at 830-31. The specific and legitimate standard can be
27 met by the ALJ setting out a detailed and thorough summary of the facts and
28 conflicting clinical evidence, stating her interpretation thereof, and making

1 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is
2 required to do more than offer her conclusions, she “must set forth [her]
3 interpretations and explain why they, rather than the doctors’, are correct.”
4 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

5 **A. Jan M. Kouzes, Ed.D.**

6 On June 2, 2011, Dr. Kouzes completed a Psychological/Psychiatric
7 Evaluation form for the Washington Department of Social and Health Services
8 (DSHS). Tr. 457-62. At the time of the evaluation, Plaintiff reported that she had
9 left Canada the week prior and was living in her car. Tr. 459. She diagnosed
10 Plaintiff with major depressive disorder, PTSD, and borderline personality
11 disorder. *Id.* She opined that Plaintiff had a marked limitation in the abilities to be
12 aware of normal hazards and take appropriate precautions, to communicate and
13 perform effectively in a work setting with public contact, and to maintain
14 appropriate behavior in a work setting. Tr. 460. She opined Plaintiff had a
15 moderate limitation in the abilities to learn new tasks, to perform routine tasks
16 without undue supervision, and to communicate and perform effectively in a work
17 setting with limited public contact. Tr. 459-60. Dr. Kouzes estimated that Plaintiff
18 would have this level of impairment for a minimum of twelve months and a
19 maximum of twenty-four months. Tr. 460.

20 The ALJ gave the opinion “some but limited weight” and provided the
21 following explanation:

22 she was dealing with significant stressors at the time of the evaluation
23 per her report including living in her car since relocating from Canada
24 one week prior. She was also not actively engaged in mental health
25 treatment or taking any medications at that time. These factors
26 undercut the reliability of her opinion. As discussed, the claimant’s
symptoms improved with medication and decreased stressors.

27 Tr. 807.

28 The explanation provided by the ALJ fails to meet the specific and

1 legitimate standard required to reject the opinion of an examining psychologist.
2 The ALJ failed to provide any example or citation to the record demonstrating that
3 Plaintiff improved with medication and decreased stressors. The ALJ's ambiguous
4 reference to "As discussed," could be seen as a reference to the credibility analysis
5 previously in the decision in which she provided citations to the record that she
6 found showed improvement in Plaintiff's mental health impairments. Tr. 805-06.
7 The earliest evidence of improvement the ALJ referenced was Plaintiff's work
8 beginning in August of 2012. Tr. 805. The remainder of the citations to the
9 medical evidence were from February 2014 to December of 2016. Tr. 805-06. Dr.
10 Kouzes opined that Plaintiff's marked and moderate limitations would persist for
11 twelve to twenty-four months. Tr. 460. Plaintiff's work beginning in August of
12 2012 was fourteen months after Dr. Kouzes' opinion and the medical evidence
13 cited is beyond the maximum projection of twenty-four months. Therefore, the
14 ALJ failed to provide any specific reason why Dr. Kouzes' opinion was not
15 reliable at least for the first twelve months she opined that it would persist. As
16 such, the ALJ's explanation is insufficient to support her treatment of the opinion.

17 Therefore, the case is remanded for the ALJ to properly address Dr. Kouzes'
18 opinion.

19 **B. N.K. Marks, Ph.D.**

20 On February 25, 2016, Dr. Marks completed a Psychological/Psychiatric
21 Evaluation for DSHS. Tr. 1653-59. He diagnosed Plaintiff with marked
22 limitations in the ability to perform activities within a schedule, maintain regular
23 attendance, and be punctual within customary tolerances without special
24 supervision, to adapt to changes in a routine work setting, to communicate and
25 perform effectively in a work setting, to maintain appropriate behavior in a work
26 setting, to complete a normal work day and work week without interruptions from
27 psychologically based symptoms, and to set realistic goals and plan independently.
28 Tr. 1657. He opined she had a moderate limitation in an additional six areas of

1 functioning. *Id.* He estimated that Plaintiff's limitations would persist with
2 available treatment for twelve months. *Id.*

3 The ALJ gave his opinion "some but limited weight," specifically rejecting
4 the marked limitations Dr. Marks provided. Tr. 808. She rejected these limitations
5 because Dr. Marks included a disclosure at the beginning of his evaluation and
6 because the marked limitations were inconsistent with the overall medical evidence
7 of record giving the example of Plaintiff's ability to work as a cook and the fact
8 that she "exceeded expectations" in the categories of dependability, customer
9 service, quality, quantity, and problem solving. *Id.*

10 The ALJ's rationale for rejecting the marked limitation does not meet the
11 specific and legitimate standard. First, the disclaimer at the beginning of the
12 evaluation is not affirmative evidence that Plaintiff misrepresented her symptoms.
13 The disclaimer reads as follows:

14 Please note: this evaluation was conducted to determine qualification
15 for Washington State HEN, TANF, or ABD programs. While every
16 effort is made to insure accuracy, it is based on client self-report and
17 clinical presentation at the time of the interview. Other records may or
18 may not have been available for review. As a result, there is always the
19 chance that factors such as criminal history or substance abuse may
20 have been underreported. The reader is advised that client presentation
21 may differ from situation to situation and the most accurate diagnostics
22 are based on several observations over time and in multiple settings.
As such, other sources of information in addition to this report should
be considered, when available, to give the most accurate clinical picture
of and prognosis for the individual.

23
24 Tr. 1653-54. Without looking beyond the existence of the disclaimer and citing
25 evidence that the opinion was unreliable, this reason fails to meet the specific and
26 legitimate standard. *See Magallanes*, 881 F.2d at 751 (The specific and legitimate
27 standard can be met by the ALJ setting out a detailed and thorough summary of the
28 facts and conflicting clinical evidence, stating her interpretation thereof, and

1 making findings.); *see Lester*, 81 F.3d at 630 (“the purpose for which medical
2 reports are obtained does not provide a legitimate basis for rejecting them.”)

3 The ALJ’s second reason, that the opinion was inconsistent with the medical
4 evidence of record, is also not specific and legitimate. While an opinion’s
5 inconsistency with the medical evidence is a specific and legitimate reason for
6 rejecting the opinion, *Batson*, 359 F.3d at 1195, the ALJ failed to specifically set
7 forth any medical evidence that was inconsistent with Dr. Marks’ opinion. Instead,
8 the ALJ cited to Plaintiff’s work history, Tr. 808, which is not medical evidence.
9 Furthermore, the evidence from Plaintiff’s work performance is not inconsistent
10 with Dr. Marks’ opinion. The ALJ cited to a nine month performance review
11 from her job in which she received a scoring of “Meets Expectations” or “Exceeds
12 Expectations” in all competencies addressed. Tr. 808 (citing Tr. 1187). What the
13 ALJ does not address is the termination letter sent just three months later which
14 details multiple occasions when Plaintiff’s work performance demonstrated the
15 very limitations Dr. Marks opined. In March and June of 2013, Plaintiff yelled at
16 co-workers. Tr. 1185. The letter states “Your behavior has been so unpredictable
17 and erratic to staff that they feel they need to have a phone nearby to call for help if
18 needed.” Tr. 1186. Plaintiff had received repeated coaching for issues such as
19 professional behavior, work choices, and tone. *Id.* She received a written warning
20 about her yelling and failure to maintain a safe working environment. *Id.* She was
21 given a training plan and a packet of trainings and failed to complete them. *Id.*
22 Therefore, upon remand the ALJ will readdress Dr. Marks’ opinion.

23 **C. Remaining Opinions**

24 Plaintiff has also challenged the opinions of Dr. Duris, Dr. Miller, Dr.
25 Postovoit, Dr. Kester, Dr. Comrie, PA Pate. However, considering the case is
26 being remanded for the ALJ to address the opinions of Dr. Kouzes and Dr. Marks,
27 the ALJ will readdress all the medical opinions in the record upon remand.

28 The Court also notes that the ALJ failed to discuss the opinion of reviewing

1 psychologist Brian VanFossen, Ph.D. Tr. 1644-45. The ALJ shall also address
2 this opinion on remand.

3 **4. Lay Witness Testimony**

4 The record contains evidence submitted by Plaintiff's boyfriend, Norman
5 Landry, partner David Goodger, and sister Betty Borchers. Tr. 255-63, 313-20,
6 1286-94, 1359

7 Lay witness testimony is “competent evidence” as to “how an impairment
8 affects [a claimant’s] ability to work.” *Stout v. Comm’r, Soc. Sec. Admin.*, 454
9 F.3d 1050 (9th Cir. 2006); *see also Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th
10 Cir. 1993) (“[F]riends and family members in a position to observe a claimant’s
11 symptoms and daily activities are competent to testify as to her condition.”). An
12 ALJ must give “germane” reasons to discount evidence from such “other sources.”
13 *Dodrill*, 12 F.3d at 919.

14 The ALJ rejected statements from these lay witnesses because their
15 observations were similar to Plaintiff’s subjective complaints; therefore, she
16 assigned them little weight for the same reasons she rejected Plaintiff’s subjective
17 complaints. Tr. 810. The Ninth Circuit has found that lay witness testimony
18 which mirrors the claimant’s unreliable testimony can be rejected: “Where lay
19 witness testimony does not describe any limitations not already described by the
20 claimant, and the ALJ’s well-supported reasons for rejecting the claimant’s
21 testimony apply equally well to the lay witness testimony.” *Molina v. Astrue*, 674
22 F.3d 1104, 1117 (9th Cir. 2012). However, the ALJ is instructed to readdress
23 Plaintiff’s symptom statements upon remand. *See infra*. Therefore, the ALJ will
24 also readdress the lay witness testimony in the record.

25 **5. Plaintiff’s Symptom Statements**

26 Plaintiff contests the ALJ’s determination that her symptom statements were
27 not consistent with the medical evidence and other evidence in the record. ECF
28 No. 17 at 20-23.

1 It is generally the province of the ALJ to make credibility determinations,
2 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
3 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
4 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
5 testimony must be "specific, clear and convincing." *Smolen*, 80 F.3d at 1281;
6 *Lester*, 81 F.3d at 834. "General findings are insufficient: rather the ALJ must
7 identify what testimony is not credible and what evidence undermines the
8 claimant's complaints." *Lester*, 81 F.3d at 834.

9 The evaluation of a claimant's symptom statements and their resulting
10 limitations relies, in part, on the assessment of the medical evidence. *See* 20
11 C.F.R. § 416.929(c); S.S.R. 16-3p. Therefore, in light of the case being remanded
12 for the ALJ to address the medical source opinions in the record, a new assessment
13 of Plaintiff's subjective symptom statements is also required.

14 **REMEDY**

15 The decision whether to remand for further proceedings or reverse and
16 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
17 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
18 where "no useful purpose would be served by further administrative proceedings,
19 or where the record has been thoroughly developed," *Varney v. Secretary of Health*
20 & *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
21 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280
22 (9th Cir. 1990); *see also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
23 (noting that a district court may abuse its discretion not to remand for benefits
24 when all of these conditions are met). This policy is based on the "need to
25 expedite disability claims." *Varney*, 859 F.2d at 1401. But where there are
26 outstanding issues that must be resolved before a determination can be made, and it
27 is not clear from the record that the ALJ would be required to find a claimant
28 disabled if all the evidence were properly evaluated, remand is appropriate. *See*

¹ *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

3 In this case even if the opinions of Dr. Kouzes and Dr. Marks were credited
4 as true, the ten month period of work must be addressed and resolved. Therefore,
5 it is not clear from the record that the ALJ would be required to find Plaintiff
6 disabled for the entire period alleged if all the evidence were properly evaluated.
7 Further proceedings are necessary for the ALJ to address all of Plaintiff's
8 impairments at step two, to readdress the medical opinion evidence, to readdress
9 the lay witness evidence, and to readdress Plaintiff's symptom statements. The
10 case shall be reassigned to a new ALJ. That ALJ will call a psychological and
11 vocational expert to testify at remand proceedings.

CONCLUSION

Accordingly, IT IS ORDERED:

14 1. Defendant's Motion for Summary Judgment, **ECF No. 21**, is
15 **DENIED**

16 2. Plaintiff's Motion for Summary Judgment, **ECF No. 17**, is
17 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
18 additional proceedings consistent with this Order.

19 || 3. Application for attorney fees may be filed by separate motion.

20 The District Court Executive is directed to file this Order and provide a copy
21 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
22 and the file shall be **CLOSED**.

IT IS SO ORDERED.

DATED February 11, 2019.

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JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE

